

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2063

To be argued by
FRANK H. SANTORO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2063

AHARON RON,

Appellant,

—vs.—

ROBERT C. WILKINSON, Warden, Federal Correctional
Institution Danbury, Connecticut, et al.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Institution Danbury, Connecticut, et al.,
Appellee.

BRIEF FOR THE APPELLEE

Statement of the Case

On May 6, 1977 there was filed on behalf of the petitioner, Mr. Ron, a petition for a Writ of Habeas Corpus challenging the circumstances under which he was denied ninety days of good time by prison disciplinary proceedings. He was represented by counsel. Attached to his petition were copies of official prison forms evidencing the course of those disciplinary proceedings and including responses made to his protests in the administrative appellate process. On the same day there was filed a Memorandum of Decision of the Honorable Jon O. Newman, United States District Judge, dismissing the petition with detailed reasons stated in support thereof. The Government was not required to respond. A subsequent motion to reconsider filed on petitioner's behalf by counsel was denied on May 25, 1977. This appeal followed.

Pursuant to local practice, the Office of the United States Attorney has been served with copies of all relevant papers and has appeared in the appellate proceedings.

Statement of the Facts

With the exception of certain self-serving characterizations thereof, the Government does not take issue with the facts as stated by the appellant both in his original moving papers and in the summation in his brief. Reference will be made to particular factual matters as they relate to the full development of this case for purposes of argument. The Government submits, however, that the District Court was correct in finding no grounds for relief even on Mr. Ron's own version of events.

Statement of Issues

In general, the appellee agrees with the identification of issues as enumerated in the appellant's brief and, for the convenience of the Court, will utilize the same numbering system. To some extent, however, those "Questions Presented" are self-serving and a more appropriate formulation of the same issues is felt to be as follows:

- 1) Was there a basis in the record for a finding that petitioner had violated Institution rules.
- 2) Was there an illegal and prejudicial deprivation of a right to a representative at the disciplinary hearing.
- 3) Was adequate notice of charges given to the petitioner.
- 4) Was the Institution Disciplinary Committee impartial.
- 5) Was there a general and overall denial of due process at the disciplinary hearing.

- 6) Was it error to dismiss the petition without requiring the Government to respond.

ARGUMENT

Summary

At issue in this case is the fairness of disciplinary proceedings in which Mr. Ron was ultimately deprived of ninety days of good time.

The Government's position is that the District Court correctly dismissed the petition, relying on the reasoning of *Wolff v. McDonnell*, 418 U.S. 564 (1973), closely relevant case law, generally accepted notions of due process and plain common sense.

The charges against Mr. Ron were clearly not without foundation and the record shows that there was adequate basis for a finding of a violation. The circumstances under which Mr. Ron proceeded to the hearing without counsel did not abridge his due process rights and, in any event, no prejudice was shown from lack of such representation. The notice given to him of the charges was adequate. And the presence of relatives on the Unit and Institution Disciplinary Committee did not deprive the latter of impartiality. The factual picture, seen as a whole, is one of essential fairness in no way rising to the deprivation of Constitutional rights necessary to invoke the issuance of habeas corpus relief. Accordingly, the Court was correct in dismissing without the requirement of a response. Petitioner was well represented by competent counsel who put his position in the best light possible. Additional information was unnecessary.

I.

There Was Sufficient Basis In The Record For A Finding That Petitioner Had Violated Institution Rules.

Mr. Ron's first main argument is couched in terms of "notice". He contends that he has been punished for violating standards of conduct that were excessively vague, broad, and sweeping. He argues that his presence in a barn with a visitor was not a violation because there was no rule specifically saying that he couldn't be in that particular barn with that particular visitor and, in any event, the circumstances of his guest's visit were totally innocent.

The Government's answer to this contention is two-fold.

First of all, it is impossible to anticipate every variety of conduct potentially deserving of proscription in prison and to cover it by codified rule. Some generalization is obviously necessary. It is the purpose of a fact finding body such as the IDC (Institution Disciplinary Committee) to determine if a specific act is sufficiently correlative with the general sanction to warrant the imposition of punishment.

It hardly seems reasonable to say that the proscriptions at issue here—"unauthorized contact with the public", "contact with a visitor in violation of posted regulations" and "being in an unauthorized area"—fail to inform the average inmate of the conduct proscribed. Mr. Ron is mistaken in presuming that every building should be marked as "unauthorized" in order for an inmate to know that he should not be inside. The specific designation of certain areas in a prison as being *available* for visitation purposes emphatically implies that other areas outside that perimeter are *not authorized*.

The dicta cited by petitioner in the case of *Meyers v. Alldredge*, 492 F.2d 296, 311 (3rd Cir. 1974), against excessive vagueness must be read in the context of earlier remarks of the Court in the same case:

Due process undoubtedly requires certain minimal standards of specificity in prison regulations, but we reject the view that the degree of specificity required of such regulations is as strict in every instance as that required of ordinary criminal sanctions. This results from the fundamental difference between normal society and prison society. The maintenance of strict security and discipline, with its unfortunate but unavoidable circumscription of an inmate's freedom to act, is essential to safe and efficient prison administration. See, for example, *Gittlemacker v. Prasse*, 428 F.2d 1, 4 (3d Cir. 1970); *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *Sostre v. McGinnes*, 334 F.2d 906, 908 (2d Cir. 1964). As such, it is nearly impossible for prison authorities to anticipate, through a narrowly drawn regulation, every conceivable form of misconduct which threatens prison security. The instant case offers a convenient example of the type of misconduct—i.e., failure to present grievances during a work stoppage where such failure prolongs the stoppage—which form of misconduct could not reasonably be anticipated by the prison administration but which the inmates should clearly have recognized as constituting dangerous and unacceptable prison conduct.

and

In *Landman v. Royster*, 333 F. Supp. 621, 655-656 (E.D. Va. 1971), the district court recognized the considerations which countervail strict application of the vagueness doctrine to prison regulations:

"1. Life is complex in prison as well as outside, and all forms of misbehavior cannot be anticipated. Some may go unpunished for want of a rule.

"2. Administrators ought not to be put to the choice of foregoing discipline in such cases or resorting to the ordinary criminal process, for flexibility may work to the benefit of the institution and the inmates as well.

"3. Legalistic wrangling over whether a rule was broken may visbly undermine the administration's position of total authority, necessary for security's sake.

"4. Prisoners, unlike free men, must well know that they are considered potentially dangerous men and must expect to be highly regimented. In such cases the law requires less in the way of notice, and places a greater burden on the individual to make inquiry or ask permission before acting."

Based on these considerations, balanced against the considerations in favor of applying the vagueness doctrine, the district court in *Landman* concluded that:

"The objections to the application of some vagueness principle may all be met simply by relaxing the standard somewhat in deference to the state's legitimate needs, rather than by abandoning it. . . ." 333 F. Supp. at 656.

We accept the approach of the *Landman* court with respect to the application of the vagueness doctrine to prison regulations.

This reasoning is appropriate to the instant case. Moreover, as the Court said in *Wolff* (at pp. 556 and 560):

Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. Cf. *Morrissey v. Brewer*, 408 U.S., at 488. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

and

We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S., at 895. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Ibid.*; *Morrissey*, 408 U.S., at 481. Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

The regulations under which Mr. Ron was punished are not unconstitutionally vague.

One dramatic fact of prison life, of which every inmate is aware, is the limitation on inmate access to specified physical areas of the institution at specified times. Whatever the standard of definiteness that would have been applicable in a civilian context, the prohibitions involved here certainly gave Ron fair and complete warning of the rules restricting his physical freedom.

Running throughout petitioner's brief is the related contention that he was "innocent" of violating any rules. Extensive commentary on the evidence in this regard is tempting.¹ The important point, however, is that the fact finding disciplinary committee had responsibility for defining whatever issue this case presented. Even if we put aside the curious concept that he should be afforded relief because he did not tell the Committee the true story, it is obvious from the reasons stated by the Committee that even the "true" version of events was of little if any greater exculpatory value.

¹ E.g. Was it not excessive solicitude for Counselor Moses' welfare that caused Mr. Ron to make statements to the IDC that "did not conform to the truth" (Appendix—Original Petition p. 3) simply because Moses had given him permission to be in the barn for other purposes?; Is it not excessively coincidental that in the "true" version of events (Appendix—Original Petition p. 6) Mrs. Duckworth just happened to run into the barn which Mr. Ron has previously frequented?; Indeed, if their presence in the barn was so purely coincidental, what of his somewhat inconsistent defense (Appendix—Memorandum in Support of Motion To Reconsider p. 1) that he "reasonably assumed" that his presence there was authorized because of prior permission?; (Compare the statements, "I earnestly felt that since I spent so much time in this area and lived right near it, that I was still within the institution compound [Appendix—Administrative Appeal Form dated December 14, 1976] with "She ran into the barn and he followed her" [Appendix—Original Petition p. 6]. (The cognition implied by the former statement seems inconsistent with the coincidence implied by the latter). If their presence in the barn was all that innocent, why was it necessary for him to hide by lying in a feed trough and her to crouch at the other end. (Appendix—Incident Report submitted as part of petition)?; What was he afraid of? (Appendix—Original Petition p. 7); If the only reason for going there was to escape another inmate who had "apparently frightened" (Appendix—Original Petition p. 6) Mrs. Duckworth, would it not be more reasonable to assume that they would welcome the arrival of prison officials (who came by vehicle) rather than hiding from them?

The law is clear that the Courts should not second guess the factual determinations made by prison disciplinary committees: "federal courts do not sit as a reviewing body over the accuracy of disciplinary committees' findings of fact" *Carter v. Woods*, No. 75-1609, at 2 (4th Cir. March 15, 1976, unpublished per curiam opinion referred to in 65 Georgetown Law Journal, No. 2, p. 545, Dec. 1976) or, as the Eighth Circuit Court of Appeals stated in *Jackson v. McLemore*, 523 F.2d 838, 839 (8th Cir., 1975)

In reviewing prison disciplinary actions, the test is "whether there exists any evidence of all, that is, whether there is any basis in fact to support the action taken by the prison officials" *Willis v. Ciccone*, 506 F.2d 1011, 1018 (8th Cir. 1974).

There was clear evidence to support the Committee's decision and the District Court properly declined to make a *de novo* determination. As Judge Newman stated in *Richards v. Wilkinson* (D. Conn., Civ. No. B77-77 March 11, 1977), "The federal courts neither hold *de novo* disciplinary hearings nor perform a generalized appellate function over institution disciplinary committees." The appellant's protestations of innocence here constitute an effort to persuade this Court to retry his case.

II.

There Was Not An Illegal And Prejudicial Deprivation Of A Right To A Representative At The Disciplinary Hearing.

When advised of his rights in connection with the disciplinary hearing, Mr. Ron was presented with three written forms. He refused to sign two of them. As a result of this refusal he went to the hearing without representation. Now he contends that there was an un-

constitutional denial of his right to representation at the hearing.

The nature and extent of the right to representation at disciplinary hearings must be examined closely. The Supreme Court in *Wolff v. McDonnell*, *supra*, at p. 570 specifically declined to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings while allowing that in exceptional cases the inmate should be permitted to seek the aid of either fellow inmates or staff members. This standard must be read in light of *Wolff's* previous (on pp. 561-562) admonition that

Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unrelenting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments.

The Supreme Court further defined the right to representation at disciplinary hearings in the case of *Baxter v. Palmigiano*, 425 U.S. 308; 96 S. Ct. 1551 (1976). There, the Court declined to extend the right to counsel at such hearings even where the charges at the hearings involved conduct punishable as a crime under state law. The reluctance to extend the scope of rights at such hearings was reflected in other aspects of the *Baxter* decision, which indicated that adverse inferences could be drawn from prisoner silence at such hearings, written reasons need not be given to inmates denied the right to confront and cross-examine adverse witnesses, and that minimum due process does not apply to lesser penalties such as the loss of privileges. As the Supreme Court reiterated

Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime.

These recent Supreme Court decisions establish that an inmate simply does not have an absolute Constitutional right to representation at disciplinary hearings. The Court recognized in *Wolff* that representation should be provided where there are exigent circumstances such as illiteracy or excessive complexity. No such exigent circumstance has been clearly demonstrated here.

Moreover, if petitioner was deprived of counsel here, a major cause of the deprivation was his own refusal to sign the required forms. The purpose of the forms, in the words of the District Court (Appendix—Memorandum of Decision p. 4), was "to protect other procedural rights." Petitioner refused to sign two forms which might arguably be viewed as restrictive (Notice of IDC Hearings; Notice of Rights before IDC Hearing) while

signing the third which was more arguably self-serving (form requesting representation).²

As petitioner correctly points out, in his brief, the relevant Bureau of Prisons Policy Statement (7400. 5 D Par. 9(c)(2)) does provide for inmate representation before the IDC but this provision should be read in light of the Statement's introductory statement of purpose

1. *PURPOSE.* This statement of policy is to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the program, behavior standards, and limitations necessarily imposed by the administration; (b) the general welfare and safety of the institutional community; and, (c) the incorporation of due process standards for inmate disciplinary hearings as prescribed by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 528, 95 S. Ct. 2963, 41 L.Ed 2d 935 (1974).

as well as its definition of inmates Rights and Responsibilities.

- | | |
|---|--|
| <p>1. You have the right to expect that as a human being you will be treated respectfully, impartially and fairly by all personnel.</p> | <p>1. You have the responsibility to treat others, both employees and inmates, in the same manner.</p> |
| <p>2. You have the right to be informed of the rules, procedures, and schedules concerning the operation of the institution.</p> | <p>2. You have the responsibility to know and abide by them.</p> |

² As the District Court found, moreover, his difficulty in communication did not prevent him from making the somewhat esoteric distinction among the forms. (Appendix—Memorandum of Opinion p. 3).

The ultimate question in this case is whether the hearing afforded to the petitioner was fair. Even if the IDC hearing did not conform precisely to the procedural requirements set forth in the Policy Statement, the District Court correctly found that no prejudice resulted to the petitioner. The question is whether his defense, as presented by a forceful advocate, was likely to have made a difference.³ The District Court had the benefit of that defense as presented by counsel and made the judgment that it would not have altered the outcome. Petitioner's refined defense presented through counsel is at odds with the evidence found credible by the IDC. If independent review by the District Court and this Court shows a sufficient lack of probability that the presently urged defense, if presented by counsel, would lead to a different result, it would be wasteful and disruptive to repeat the administrative process. This Court has not been hesitant to apply the harmless error doctrine in criminal matters. *United States of America v. Wallace Jarvis*, — F.2d — (2d Cir. Slip Op. No. 850, July 26, 1977). The doctrine is no less appropriate here.

III

Petitioner Was Given Adequate Notice Of The Charges.

Wolff provides that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and enable him to

³ Actually, there is some suggestion in the record that petitioner, supposedly unable to communicate well in English, had some representation at least in the latter stages of the administrative process. Witness the very fluid prose of his appeal form dated December 14, 1976. (Appendix—BOP Central Office Appeal Form).

marshall the facts and prepare a defense. Mr. Ron makes the argument that because the precise formulation of these charges was altered somewhat in the progress of his case from incident report to UDC to IDC, there has been a violation of this Constitutional prerequisite. This argument is somewhat reminiscent of the now discredited common law pleading custom that a pleader was out of court if he used the wrong writ and the District Court was correct in summarily dismissing it without substantive comment.

The incident took place on September 14, 1976 and the UDC met with petitioner present the next day. The forms themselves suggest, and it is not alleged to the contrary, that written notice was perfected as of this time. It is alleged that written notice of the IDC hearing was given prior thereto. That hearing took place six days later. This was adequate time to prepare a defense to the charges upon adequate notice thereof. They were not that difficult to comprehend. They did not involve any particularly abstruse legal questions. Beyond the bald allegation that "A defense to these two charges requires the gathering of different facts and arguments than the charges to which petitioner was given notice", Mr. Ron has not suggested how such conflicting burdens of factual and argumentative accumulation were presented to him. And, in any event, legalisms such as esoteric variants of the doctrines of collateral estoppel and autrefois acquit have no place in the relatively less formalistic environment which the Supreme Court contemplated in disciplinary hearings. While the Court did refer to certain practices taking place which "may reshape the nature of the charges or the evidence relied on," *Wolff v. McDonnell*, *supra*, 418 U.S. at 564, here there is not the slightest suggestion that the essential nature of the charges was altered or the nature of the incriminating evidence changed.

The one charge of "being in an unauthorized area" remained the central theme throughout the proceedings. To argue that the notice requirement was defeated simply because other generic definitions were occasionally used is to engage in a casuistry reminiscent of medieval scholasticism. The modern rules of procedure allow a degree of amendment to conform to the evidence (see Federal Rules of Civil Procedure, Rule 15), and so long as there is no drastic (and thus truly unfair) modification, a reasonable description of the charges is all that is required of prison administration. Once again, a holding to the contrary would undermine the proceedings precisely that sort of "adversary case" that the Supreme Court sought to prevent.

IV

The Institution Disciplinary Committee Did Not Lack Impartiality.

The Government can hardly quarrel with the proposition that the Institution Disciplinary Committee should be impartial in administering its adjudicatory functions. The more refined question here is whether the mere presence of relatives on both the UDC and the IDC deprived the latter of this impartiality as a matter of law. It is submitted that the District Court was correct in terminating this allegation "conclusory" and answering the question in the negative.

Those cases that have dealt with the issue of impartiality have always required some showing that a board member be actively involved in the *investigatory* stage of the case before his presence on the *adjudicatory* body deprives the latter of impartiality. Thus in *Meyers v. Alldredge*, 492 F.2d 296, 305-306 (3rd Cir. 1974), impartiality was lacking because the Associate Warden who

sat on the two adjudicatory committee levels had a direct, extended, and personal involvement in the events (work stoppage) which led to the charges. The Court noted at p. 306

In holding that Cansler's presence on the disciplinary committees was improper, we emphasize that the requirement of an impartial tribunal prohibits only those officials who have a direct personal or otherwise substantial involvement, such as major participation in a judgmental or decisionmaking role, in the circumstances underlying the charge from sitting on the disciplinary body. This would normally include only those such as the charging and the investigating staff officers who were directly involved in the incident.

In *Morrissey v. Brewer*, 408 U.S. 471, 485 (1971), it was held that the determination that reasonable ground exists for revocation of parole should be made by someone "not directly involved in the case." *United States ex rel. Miller, v. Twomey*, 479 F.2d 701, 716 (7th Cir. 1973) spoke of a factual determination having to be made by "... a person or persons other than the officer who reported the infraction." *Landman v. Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971) spoke to the issue as follows:

First, the decision to punish must be made by an impartial tribunal. This bars any official who reported a violation from ruling. *Goldberg v. Kelly, supra*, 397 U.S. 271, 90 S.Ct. 1011; *Escalera v. New York City Housing Authority*, 425 F.2d 853, 863 (2d Cir. 1970). A substantial question arises whether field unit officials can ever so divorce themselves from events in their small units sufficiently to sit impartially. The Court has not been shown that this is impossible, but in any individual case participation in occurrences giving

rise to a charge shall bar any man from sitting in judgment. There appears to be no reason to require that the disciplinary board be composed of any specific number of individuals. Each member of a panel must, however, be free of prior involvement with the incident under examination so that he may settle the case on the basis of the evidence at the hearing.

And in *Braxton v. Carlson*, 483 F.2d 933, 934 (3rd Cir. 1973), the Court found that initiation of measures by the associate warden to bring a near mutiny under control did not disqualify him from serving as an impartial adjustment committee member in disciplinary proceedings with respect to alleged participants in the disturbance, where he was neither a witness nor an investigator.

This body of law indicates that the District Court was correct in requiring an actual showing of partiality, rather than adopting a conclusive presumption as a matter of law, simply because relatives may have served on both committees. First, there is no suggestion that the relatives even conferred with each other; if blood relationship is to be a *per se* test for conflict of interest many societal arrangements would have to be modified. Moreover there is no suggestion that either member formally investigated the case. The incident was reported by one John Trench who responded to the scene with Mr. J. Daley. The UDC did not really participate in this process in a way which would abrogate its essentially adjudicatory function. Rather than act as the final arbiter, it referred the case to the IDC, much as does a magistrate upon finding of probable cause. The ultimate adjudicatory function was performed by the IDC. To construct from this set of circumstances the contention that the hearing was infected by bias is an exercise in hyperbole well deserving of the summary treatment given by the District Court.

V.

The Hearing Fully Comported With Due Process.

Appellant's fifth argument is a generalized assertion that the combination of circumstances in his case amounted to a denial of his right to be heard in a meaningful manner. His probing attempt to reconstruct imperfections in the procedural aspects of his case misperceives the nature of the disciplinary hearings as envisaged by the Supreme Court. It is not a "criminal prosecution" but a "mutual accommodation" between prison needs and Constitutional principles where a "striking the balance" is necessary involving something less than the automatic application of "procedural rules designed for free citizens." It must be, moreover, viewed against a background of "tension" involving a "tightly controlled environment peopled by those, who have chosen to violate the criminal law." *Wolff v. McDonnell*, *supra*, pp. 556-562. By this standard, the process accorded Ron fully comported with the Fifth Amendment.

VI.

The District Court Properly Dismissed The Petition Without Requiring The Government To Respond.

The practice of dismissing prisoner complaints without the requirement of a response has been a subject of concern to this court, primarily in cases where the petitioner was proceeding *pro se*. *Lewis v. State of New York*, 547 F.2d 4 (2d Cir. 1976); *Cunningham v. Ward*, 546 F.2d 481 (2d Cir. 1976); *Mawhinney v. Henderson*, 542 F.2d 1 (2d Cir. 1976); *Burgin v. Henderson*, 536 F.2d 501 (2d Cir. 1976); *Frankos v. LaVallee*, 535 F.2d 1346 (2d Cir. 1976). This concern has been expressly recognized by the District Court involved here, see *Pugh v. Hull*, 419 F. Supp. 39 (D. Conn. 1976). Among the

reasons for this concern have been the latitude necessarily granted to pro se pleadings *Haines v. Kerner*, 404 U.S. 519 (1971), the problems created in appellate proceedings when there is no appellee *Bauers v. Heisel*, 361 F.2d 581, 584 nn 2.3 (3rd Cir. 1966); *Lewis v. State of New York supra*, p. 6 and the general waste of judicial resources *Lewis v. State of New York, supra*, p. 6. Most of the New York cases, moreover, involved *sua sponte* dismissals in the face plainly Constitutional allegations.⁴

None of these factors are present in this case. The petition herein involved was not *pro se*. Rather petitioner has been consistently represented by counsel who have substantial experience in this area of the law. See *Allen v. Aytch*, 535 F.2d 817, 821 n. 21 (3rd Cir. 1976), (the normal *Haines* presumption toward liberal interpretation of pro se complaints may not apply to a complaint drafted by a third year law student under the supervision of a member of the bar). Petitioner's petition was well presented not only in his original moving papers but in a subsequent motion for reconsideration.

The *Bauers v. Heisel, supra*, problem is also not present. Pursuant to a local practice noted in *Pugh v. Hull, supra*, at p. 40 the United States Attorney has been served with copies of all significant papers and has participated in this appeal thus avoiding the awkwardness referred to by Judge Kaufman in *Lewis v. State of New York, supra*, at p. 6. And there is no unnecessary waste of judicial resources. If the Government had responded it is highly unlikely that it would have done more than

⁴ Note, for example, that in *Frankos v. LaVallee, supra*, where the Court, on rehearing, became aware of the further Supreme Court enunciation of the right to counsel in *Baxter v. Palmigiano, supra*, it did not hesitate to reverse its previous position and affirm the original *sua sponte* dismissal by the District Court.

present law and facts already in the record with all the additional administrative burden on the Court consequent thereto.

The statute governing Habeas Corpus procedure plainly provides for summary dismissal under the circumstances at bar. The enabling language could not be more clear:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

28 U.S.C. § 2243

Moreover the Habeas Corpus Rules proposed by the Supreme Court and approved by Congress effective February 1, 1977 provides in relevant part as follows:

Rule 4. Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

West's Federal Rules, 1977 Ed. p. 558

There is no reason why a Court should be compelled to go through the totally redundant ritual of requiring an answer when its mind is made up on the basis of its own careful reasoning as applied to a well articulated position. It has historically been held that no response is necessary when the complaint is "doomed" to failure. For example in *Higgins v. Steele*, 195 F.2d 366 (8th Cir. 1952), the Eighth Circuit said:

The federal courts should, we think do all that reasonably and lawfully may be done to dispose of petitions for habeas corpus, and kindred proceedings, which are patently frivolous or obviously without merit, as expeditiously and with as little trouble and expense to the respondents as possible. While it is important that no prisoner be denied justice because of his poverty, it is also important that the prison authorities, government counsel, and the courts be not harassed by patently repetitious, meritless, frivolous or malicious proceedings.

See also *Pruitt v. Skeen*, 118 F. Supp. 240, 242 (N.D.W. Va. 1953); *Gershon v. United States*, 243 F.2d 527, 530 (8th Cir 1957); *Taylor v. United States*, 308 F.2d 776, 779 (8th Cir. 1962). Statistics such as those showing over 100% increase in prisoner petitions during roughly the last decade should militate toward some sense of efficiency in this area and whatever leveling off may have taken place in recent years may be due largely to the efficiency of the administrative appellate system utilized (and considered by the Court) in this case. See *The Federal Bureau of Prisons Administrative Grievance Procedure. An Effective Alternative to Prisoner Litigation*, 13 American Criminal Law Review, No. 4, Spring 1976 p. 779 et seq., nn. 10, 137. While recognizing the legitimate need for attention to valid prison complaints, the Courts should not let the pendulum swing so far as to ignore the aphorism of Albert Camus that "In prison,

dreams have no limits and reality is no curb." Camus, *The Rebel*, p. 36 (Bower transl. 1956) Vintage Books. The relatively substantial number of prison complaints without foundation should not burden the docket to the detriment of more deserving cases when they can be disposed of fairly yet more summarily.

Perhaps the best answer to this question is provided in the recent Supreme Court case of *Estelle v. Gamble*, 429 U.S. 97 (1976) which affirmed the sua sponte dismissal (without a response having been ordered—see n. 2) of a prisoner complaint as to his medical care on the grounds that there was no "deliberate indifference to serious medical needs." Specifically rejecting a contention by Justice Stevens in dissent that the pro se complaint should not have been dismissed under *Haines v. Kerner*, *supra*, reasoning, the majority at p. 108 n. 16 found that the complaint provided a detailed factual accounting of treatment received rendering speculation unnecessary. For the same reason that the Supreme Court found the pro se complaint in *Estelle* worthy of withstanding the lack of a response, so should this Court *a fortiori* find the same to be true of the complaint in the case at bar which was drafted by counsel. The action of the District Court in its order of dismissal was entirely appropriate.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-2063

AHARON RON,
APPELLANT

vs.

GEORGE V. WILKINSON,
APPELLEE

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street,
New York, N. Y. 10023

That on the 6th day of September, 1977, deponent served the within Brief
upon Dennis E. Curtis, Esq., Stephen Wizner, Esq. and Mary F. Keller, Esq.
127 Wall Street, New Haven, Connecticut 06520

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 6th day of September, 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1979